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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 303

MARATHON OIL COMPANY, *Petitioner*

v.

BROOKLYN UNION GAS COMPANY, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The Brief in Opposition filed herein by Respondents confirms Petitioner's analysis of the true nature of the issues presented in this case and underscores the need for a grant of certiorari by this Court.

Stripped of all extraneous contentions, the claim asserted by Respondents in this litigation, and allowed by the courts below, is this: *Petitioner criminally violated Section 4 of the Natural Gas Act* when it collected its price increases under its contract without first making filings with the Federal Power Commission *and, for this reason alone, Petitioner must make restitution* to Respondents who are customers of Petitioner's pipe line customer (Br. in Opp., pp. 7-8).

As we shall show in the paragraphs which follow, this is clearly not the law.

Throughout this litigation, Petitioner has taken the position that the collection of its contract prices during the court stay of FPC Order No. 174-A was *lawful* and that there is no basis in law or in equity for the recovery allowed by the courts below. We adhere to that position. However, now that the true basis for the claim asserted by Respondents has been made clear, the answer thereto is simple and obvious: Even if it be assumed that Petitioner's collection of the price increases was a violation of the Act, punishable by appropriate action, this would not give Respondents a right to bring suit for such moneys, or authorize the entry of a judgment awarding a recovery thereof, *because the Natural Gas Act contains no provision authorizing third parties in institute actions arising out of violations of its provisions.*

The jurisdiction and powers of the courts in respect to violations of the Natural Gas Act or the regulations issued thereunder are limited to those prescribed in Sections 20, 21 and 22 of the Act. 15 U.S.C. 717s, 717t and 717u. Section 20, 15 U.S.C. 717s, authorizes the

Commission to institute actions in the United States district courts to enjoin violations of the Act or regulations, or to compel compliance therewith, and empowers the Attorney General to institute any necessary criminal proceedings. Section 21, 15 U.S.C. 717t, prescribes the penalties which may be imposed for willful violations and Section 22, 15 U.S.C. 717u, vests in the district courts exclusive jurisdiction of violations of the Act and of suits brought to enforce any liability or duty created by, or to enjoin any violation of, the Act or the regulations and orders issued thereunder.

A reading of the aforementioned sections of the Act makes it clear that the only party authorized to institute proceedings arising out of violations of the Natural Gas Act is the Federal Power Commission, acting either directly or through the Attorney General. The Act does not vest any such right in third parties, such as the Respondents in this case.

The absence of a right in third parties to maintain actions to recover for violations of the Natural Gas Act is confirmed by numerous cases interpreting counterpart provisions in similar legislation. An example is to be found in the *Consolidated Freightways* litigation involving the Motor Carrier Act[1] of August 9, 1935, 49 Stat. 543, as amended, 49 U.S.C. 301, et seq., the enforcement provisions of which are substantially the same as those embodied in Sections 20 and 22 of the Natural Gas Act (see Section 222, 49 U.S.C. 322). In the *Consolidated Freightways* case, a district court, in a suit by the Interstate Commerce Commission, had enjoined, as un-

[1] Also cited as Part II of the Interstate Commerce Act.

lawful, the uncertificated operations of a motor carrier. *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816 (C.A. 9, 1951), cert. den. 342 U.S. 830. Thereafter, a certificated carrier brought suit to recover damages based on the unlawful activity of its competitor. First the federal courts (*Consolidated Freightways* v. *United Truck Lines*, 216 F. 2d 543 (C.A. 9, 1954), cert. den. 349 U.S. 905) and later the state courts (*Consolidated Freightways* v. *United Truck Lines*, 216 Ore. 515, 330 P. 2d 522 (1958), cert. den. 359 U.S. 1001) denied recovery on the ground that the Motor Carrier Act excludes a private remedy in the courts for violations of its provisions.[2] In this connection, the Supreme Court of Oregon stated (330 P. 2d at 529):

> * * * it is our opinion that the Congress intended to vest in the Interstate Commerce Commission the sole authority to enforce the provisions of the Act, precluding private relief in both federal and state courts either by way of injunction or damages. Therefore the plaintiff is not entitled to recover in this action.

Another statute which limits suits for violations thereof to those authorized by its provisions is Section 3 of the Robinson Patman Act of June 19, 1936, 49 Stat. 1526, 1528, 15 U.S.C. 13a. This is established by this Court's decision in *Nashville Milk Co.* v. *Carnation Company*, 355 U.S. 967. See also *United States* v. *Parkinson*, 240 F. 2d 918 (C.A. 9, 1956), where restitution was denied in a suit arising out of a violation of Section 301(a) of the Food, Drug and Cosmetic Act,

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[2] The enforcement provision of Part II of the Interstate Commerce Act, 49 U.S.C. 322, is thus different from counterpart provisions in Part I, the railroad portion of the Act. See 49 U.S.C. 8.

21 U.S.C. 331(a), on the ground that the district court had no jurisdiction to give such relief under the statute. In this connection, the court stated (240 F. 2d at 922):

> The holding of the Court is that neither the statute nor any other legislation gives the District Court jurisdiction to grant the relief sought. The equitable powers of the court cannot be invoked in the situation because of lack of statutory authority, express or implied.

See also and compare *San Diego Unions* v. *Garmon*, 359 U.S. 236, 246-247.

In its consideration of the Petition filed herein, the Court is urged to keep in mind that the claim asserted by Respondents is not a common-law contract claim, since Petitioner collected only its contract prices and no more.[3] It is a claim based *solely* on an alleged violation of a statute. What Respondents are really seeking to accomplish, therefore, is the imposition of a statutory penalty when no such remedy is provided by the statute in question. This should not be allowed. As was stated in the *Parkinson* case, *supra*, "Anything which savors of a penalty should not be permitted unless Congress has expressly so provided, since the spirit of equity abhorred such punitive measures." 240 F. 2d at 922.

In our Petition for a Writ of Certiorari, we have shown that the court below has erroneously decided an important question of statutory construction which

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[3] This completely distinguishes the present case from *Natural Gas Pipeline Co. of America* v. *Harrington*, 246 F. 2d 915 (C.A. 5, 1957), cert. den. 356 U.S. 957, relied on so heavily by Respondents (Br. in Opp., 8-9).

should be corrected by this Court, that the decision below is in conflict with controlling decisions by this Court in the law of restitution,[4] and that the lower court's action invades the domain of administrative action, since the Federal Power Commission has never found that the rate collected by Petitioner is not a "just and reasonable" rate under Section 4 of the Natural Gas Act.[5] Moreover, the Commission has never taken any action. As a consequence, the question as to what action the Commission might have taken under its statutory powers is not here presented, because no action was taken.

For all of these reasons, plus the now obvious fact that the recovery allowed by the court below is one

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[4] Respondents chide us for placing in the record the action of the Commission in respect to the rate allowed for Sun Oil Company's sale under the same contract from the same field and the rate ultimately allowed to Petitioner for this same sale (Br. in Opp., p. 2). Respondents miss the point of this evidence. It establishes the fact that the pipe line purchaser and Respondents paid no more for the gas than it was worth and no more than the rate allowed by the Commission. Respondents are thus unable to show any *financial injury*, and indispensable element of a claim for restitution.

[5] Respondents suggest that the Commission, in a letter dated August 21, 1957, advised Petitioner that it would be necessary for Petitioner to refund the price increases collected by Petitioner (Br. in Opp., pp. 4-5). This is not the case. The letter referred to was not from the Commission but from its Acting Secretary, without Commission direction. When Petitioner, in a subsequent letter dated October 15, 1957 (annexed to Petitioner's Reply Brief in Support of Summary Judgment, R. 642) advised the Acting Secretary that his suggestion was contrary to discussions had with the Commission when Petitioner made its filings, no further word was received by Petitioner and the Commission has taken no action in respect to the matter.

not authorized by the Natural Gas Act, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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